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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

FILED

16-1961

STATE OF UTAH,

Plaintiff and Respondent,

vs.

CECIL A. DICKSON,

Defendant and Appellant.

Supreme Court, Utah

Case No.
9343

REPLY BRIEF

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

vs.

CECIL A. DICKSON,

Defendant and Appellant.

Case No.

9343

BRIEF OF RESPONDENT

STATEMENT OF FACTS

On 17 May 1960 the appellant, Cecil A. Dickson, was convicted by jury trial of the crime of robbery under the provisions of 76-51-1, U. C. A. 1953. The long resume of facts presented by the appellant in his brief is adequate to apprise the reader of the summary of evidence presented, but somewhat excessive to the issues of error raised on appeal in the brief.

A more detailed examination of the specific por-

tions of the trial, relevant to the issues before the Court, is felt necessary.

A more detailed examination of the specific portions of the trial relevant to the issues before the Court is felt necessary.

The appellant raised the issue of alibi at his trial. In support of his contention, deposition testimony of several witnesses was introduced and presented to the jury (R. 148). For all but one witness the state presented cross interrogatories to the questions asked by the accused. It was stipulated that the questions to each deponent were put and answered under oath (R. 149). Rose Vaile, the appellant's mother, was the first deposition witness. Her general testimony on direct examination was in support of the appellant's contention of alibi. On cross examination the District Attorney posed the following question and received the following answer:

"Q. Do you understand that you are under oath and that any answers you give which are not true *could subject you to a criminal charge of perjury?*

"A. Yes" (R. 152).

The appellant's brother also testified by way of deposition, and on cross examination the same sequence of question and answer was had as to his awareness of possible criminal charges for perjury as is set

out above (R. 157). In addition to a question concerning what, if anything, was said between he and appellant's attorney, the following answer was elicited (R. 157-8).

"Q. What was said and by whom?

"A. He just asked us about this, and we answered them. He told us that *we knew that we would be under oath* or something like that, and told us whatever we did to tell the truth."

The appellant's sister-in-law also acknowledged that she was under oath and subject to perjury (R. 160). The same indication was obtained by cross interrogation from the accused's sister (R. 165). Only the ex-wife of the accused did not affirmatively indicate an awareness of possible perjury charges for false testimony by deposition (R. 168). This apparently was because the District Attorney posed no cross interrogatories. However, a clear stipulation was before the jury that all deponents were under oath (R. 149).

With reference to the District Attorney's argument to the jury concerning deposition testimony, it does not appear of record specifically what was said; apparently the comment was raised on rebuttal argument (R. 247). However, the Court specifically allowed the accused's counsel the right of additional rebuttal to the argument (R. 247).

Accused's counsel requested an instruction be given to the jury to the effect that witnesses giving testimony by interrgoatory are subject to the penalties of perjury (R. 249). The Court indicated in writing on the proposed instruction that it was to be given in substance (R. 23). The Court thereafter instructed the jury without specific deference to witnesses who appeared in person or by deposition, but instructed the jury that, as to which, if any, witness they were to believe, and what weight to be given thereto is a matter of their determination (R. 43-45). The Court's failure to give the exact requested instruction is claimed to be prejudicial error.

The accused took the stand to testify in his own behalf. After testifying on direct examination he was subjected to cross examination by the District Attorney. The relevant part of this cross examination is set out below:

"Q. And you were in prison for robbery weren't you?

"A. Yes sir.

"Q. And that was on two counts, wasn't it?

"A. I believe so.

"Mr. King: Mr. Banks, you may ask how many convictions there were I believe.

"Mr. Banks: I am using this for the purpose of *modus operandi*, Your Honor.

"The Court: I think he can tell—you could go into the type of conviction, how many convictions there were. I think he may answer if there were two counts.

* * *

"A. Yes, two counts.

"Q. And that was two separate robberies?

"A. Yes, sir, but they were all right in the same—

"Q. Same area of time?

"A. About the same, yes.

"Q. But they were two different robberies?

"A. Yes sir.

"Q. And both of those happened to be food markets too, didn't they?

"A. No, sir. They were liquor stores" (R. 211-212).

This last testimony was all unobjected to. Counsel's objection, if such it was, was directed to requesting the District Attorney to ask the number of convictions.

The testimony as to time and liquor stores was volunteered by the accused.

The District Attorney then went on to question the accused about an incident that happened subsequent to the charge he faced at the instant trial (R. 213). The incident concerned a fracas in which the accused participated with his brother, and was charged with being an accessory to attempted robbery (R. 218). Whether this incident resulted in a conviction is unclear. The incident was brought out over objection by the accused's counsel (R. 214) although on recross the accused's counsel made additional inquiry concerning the incident (R. 219). It appeared that this incident was in association with the accused's brother. The prosecution's evidence in the instant case inferred that the crime with which the accused was charged was also so carried out. (Appellant's Brief, pp. 2, 4.) The trial judge instructed the jury that the evidence of other crimes committed by the accused could not be considered as evidence that he committed the crime with which he was now charged, but that it could be considered only as to what weight to give to the testimony of the defendant himself (R. 46).

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN NOT GIV-

ING THE INSTRUCTION REQUESTED BY THE ACCUSED THAT PERSONS WHO TESTIFIED FALSELY COULD BE CHARGED WITH PERJURY.

POINT II.

THE TRIAL COURT DID NOT COMMIT ERROR IN RECEIVING EVIDENCE OF PREVIOUS CONVICTIONS OF THE ACCUSED NOR IN RECEIVING TESTIMONY SURROUNDING THE CONVICTION.

POINT III.

THE COURT DID NOT COMMIT ERROR IN RECEIVING EVIDENCE OF OTHER MISCONDUCT OF THE ACCUSED NOT RESULTING IN CONVICTION.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN NOT GIVING THE INSTRUCTION REQUESTED BY THE ACCUSED THAT PERSONS WHO TESTIFIED FALSELY COULD BE CHARGED WITH PERJURY.

There is no requirement that a court give every instruction proposed by a party. If the instructions given adequately appraise the jury of the law, the defendant may not command that the instructions be given in the words proposed by him. *State v. Campbell*, 116 Utah 74, 208 P. 2d 530 (1949). It is sufficient if from all the instructions, when read as a whole, the jury is clearly apprised of the law that it must apply. *Wilson v. Gardner*, 10 Utah 2d 89, 348 P. 2d 931; *State v. Cox*, 106 Utah 253, 147 P. 2d 858 (1944). Nor is there any requirement that a court give an instruction that would mislead the jury, be unnecessary, or which is erroneous. *State v. Erwin*, 101 Utah 365, 120 P. 2d 285 (1942). Nor is it error to refuse a requested instruction if the matters are necessarily encompassed in other instructions. *State v. Houngensen*, 91 Utah 351, 64 P. 2d 229 (1937). Error in the instant case can only be claimed if the proposed instruction, proffered by the accused, was applicable and correct, and if the Court had a duty to so instruct and did not otherwise adequately cover the tendered matter. *U. S. v. Hancey*, 108 F. 2d 835 (C. C. A. Utah 1940).

An analysis of the facts of the instant case and the proposed instruction make it clear that there has been no error. The appellant contends that since the testimony of some of the witnesses was by deposition, and that since the prosecutor inferred they were lying that unless the proposed instruction was given the jury

may be mislead into believing that the testimony of deposition witnesses is not of the same weight as that of witnesses that appear in person. It should be noted first that counsel did not make any request for instructions relative to deposition testimony per se, but merely requested that the jury be informed that all witnesses, both those present in person and by deposition, are subject to perjury charges for knowingly giving false testimony. It is submitted first that such an instruction is irrelevant and without merit, and since there is no requirement that irrelevant or unmeritorious instructions be given, no error was committed. *State v. Erwin*, supra.

The essential requirement to a witnesses' testimony is not that a witness be under legal compulsion to speak truthfully, but that the witness have *knowledge* of the need to tell the truth and recognize the necessity for doing so. The fact that a statute exists making it a crime to give false testimony is of no matter to the jury, what is essential is that they know that a witness feels compulsion to tell the truth. In the instant case the proposed instruction was merely an incomplete paraphrasing of the penal definition of perjury, 76-45-1, U. C. A. 1953. It would be no more relevant than an instruction on what constituted the law of perjury. The crime of perjury was not before the jury nor was there any evidence that perjury had been committed. Instructions should only concern the crime charged and not others not before the court.

Abbott, *Criminal Trial Practice*, § 668. Therefore, the instruction was not geared to the evidence, was not relevant, nor could it properly effect the juries' deliberations. Instructions not adjusted to the evidence or which are irrelevant are not proper. *Draine v. State*, 89 S. E. 2d 182, 2116a 801; *People v. Liss*, 35 Cal. 2d 570, 219 P. 2d 789. The jury already had before them the testimony of all but one of the witnesses indicating that they understood and believed they could be charged with perjury for wilfully giving false testimony. The specific admission of belief which evidences a motive to tell the truth is what is essential; giving the jury an abstract statement of criminal law could in no way be relevant to the charge or add to the information before the jury as to the weight to be given the testimony. After a witness had admitted he believed he could be punished, which is the essential element of credibility of a witness, McCormick, *Evidence*, p. 139, et seq., an instruction that the criminal law imposed sanctions would be immaterial. It would not be material to any evidence before the Court, nor material to effect the credibility or weight to be given such testimony. The correct instruction to have been requested would have been one that deposition testimony is entitled to the same consideration, the same rebuttable presumption that the witness speaks the truth, and same judgment on the part of the juror with reference to its weight. Such an instruction was not requested, and is a far cry from the immaterial request made by counsel for the accused.

Under the circumstances of this case, it appearing that the requested instruction was not material to any issue before the jury, and was merely a statement of penal law not then being considered by the Court, it was not error to deny to give the same. *State v. Phillips*, 136 Kan. 407, 15 P. 2d 408. It is said that instructions must include two principal groups: (1) those stating the substantive law of the case, and (2) those relating to the rules for weighing evidence. Since the requested instruction fits neither of these categories it was not error to refuse it. Abbott, *Criminal Trial Practice*, 4th Ed., Sec. 673.

It is generally recognized that the court has power to modify and conform the instruction to its own view of the law. Abbott, *op. cit.*, p. 1249. In the instant case, as evidenced by the trial judge's notation on the proposed instruction, the correct instruction concerning the weight to be accorded the testimony was given. (Instructions 7, 8 and 9. R. 44-45.) There is no question but that these instructions were correct. They properly apprised the jury of their duty to consider the testimony of all witnesses. In construing these instructions as a whole they adequately supplied the jury with the correct principal to be applied in weighing the evidence. As the instruction proposed would have added nothing, the instruction given adequately corrected the situation and sufficed.

Finally it cannot be contended that the accused

was prejudiced by any failure to give the instruction as requested. The jury had before them the testimony of the witnesses themselves that they believed they could be punished for perjury if they knowingly gave false testimony, and the accused's counsel was afforded additional time to argue against any inference that the District Attorney may have made concerning the deposition testimony. As such it cannot be claimed that the failure to give the instruction in any way prejudiced the accused or left the jury without a sufficient guide to weigh the evidence.

From this it must be concluded that no prejudicial error was made by the trial court concerning the charge to the jury.

POINT II.

THE TRIAL COURT DID NOT COMMIT ERROR IN RECEIVING EVIDENCE OF PREVIOUS CONVICTIONS OF THE ACCUSED NOR IN RECEIVING TESTIMONY SURROUNDING THE CONVICTION.

It is a generally recognized principal of law that an accused testifying on his own behalf may be impeached like any other witness by proving that he has been convicted of a felony. *State v. Thorne*, 39 Utah 208, 117 Pac. 58; 77-44-6, U. C. A. 1953. There is no question then, but that the examination of the

accused Dickson concerning a previous conviction for robbery is proper for impeachment purposes. There is no question but that the examiner may ask about the name of the crime committed, *State v. Crawford*, 60 Utah 6, 206 Pac. 717 (1922), and the punishment awarded, McCormick, *Evidence*, Sec. 43. As to how far in addition an examiner may proceed is not clear. Certainly if he goes forward without specific objection by counsel no error may be claimed. Wigmore, *Evidence*, § 18. In the instant case counsel was hardly lucid in his objection to inquiry into the facts of the accused's past convictions. The record merely reflects a statement from counsel addressed to the prosecutor concerning inquiry into the number of convictions. His failure to object to the prosecutor's question concerning details of the crime may well act as a waiver. McCormick, *Evidence*, Ch. 6. It must be noted that the trial judge said nothing concerning the prosecutor's right to enter into the details of the crime, and presumably from the Court's statement nothing would prevent the defense counsel from then objecting. Counsel's failure to do so must be deemed a waiver, and he cannot now claim error on appeal.

Even so the inquiry, based on the representation of the prosecutor that it was to go to *modus operandi* was proper. Evidence and facts of a specific crime may be introduced for the purpose of showing plan or scheme. The *modus operandi* of a robber is of relevance to show that the accused in the past has also

used such a plan or scheme to effect his illegal means. *People v. Peete*, 28 Cal. 2d 306, 169 P. 2d 924.

In the instant case the prosecutor possibly did not go far enough to clearly demonstrate the full effect of the principal of *modus operandi*; however, what he did elicit was relevant. He did demonstrate a close relationship to the instant crime. It was shown that other retail type business establishments had been the subject of the accused's criminal intentions, and that his operations were in close proximity of time to each other. All of these factors were relevant to the mode of commission of the instant crime. It must be remembered that the modern criminal does all he can to disguise his actions and avoid detection; therefore, the requirement that a scheme be a full reflection of past conduct is ridiculous. With specific reference to the personalities and intelligence of white male criminals convicted of robbery, see 49 *Journal of Criminal Law, Criminology and Police Science* 412. It is enough that the evidence reasonably tends to connect the accused to the crime charged. *State v. Scott*, 111 Utah 9, 175 P. 2d 1016; *State v. Nemier*, 106 Utah 307, 148 P. 2d 327. As was said in *State v. Neal*, 123 Utah 93, 254 P. 2d 1053 (1953), with reference to the rule in Utah:

“* * * the state may not prove other offenses where the sole and only purpose of such proof is to show defendant's propensity to commit crime because the jury is apt to give such

evidence undue weight, but such evidence is admissible when offered for the purpose of showing an intention or design to or a motive for commission of the offense charged. In other words, the rule as stated in the *Nemier* case and more clearly by Mr. Chief Justice Wolfe in the *Scott* case, *supra*, is that evidence of other offenses is excluded *only* where the sole purpose is to show defendant's propensity for the commission of crime and does not include cases where the purpose of such evidence is to show defendant's intention or design to or motive for commission of the crime charged."

Hence in the instant case it was not error to allow the prosecutor to proceed as he did. *State v. Lyman*, 10 Utah 2d 58, 348 P. 2d 340.

Finally, it cannot be said that the receipt of the additional information prejudiced the accused. A substantial number of cases have indicated that the record of the former conviction itself is admissible in evidence, and hence anything contained therein not directed to inciting the jury should be received. *State v. Hougenson*, 91 Utah 351, 64 P. 2d 229; *State v. Green*, 167 Wash. 266, 9 P. 2d 62; *State v. Rodia*, 132 N. J. L. 199, 39 Atl. 2d 484. Since the facts, actually volunteered by the accused in the instant case, would have been shown had the record itself been introduced, no claim of prejudice should be had. In addition in the instant case the only factor not clearly admissible even if a very narrow approach is taken would be the type of store involved. This was volunteered by the ac-

cused in the instant case, and even so did not hurt his position since it diluted the more specific connection the prosecutor had tried to demonstrate. As a consequence it is equally as inferable that he was helped by it as hindered. The appellant's claim of error on this point is, therefore, not well taken.

POINT III.

THE COURT DID NOT COMMIT ERROR IN RECEIVING EVIDENCE OF OTHER MISCONDUCT OF THE ACCUSED NOT RESULTING IN CONVICTION.

Appellant contend sthat the trial court erred in allowing examination of the accused, by the District Attorney, into the incident in Fort Worth, Texas, that resulted in the accused being charged as an accessory after the fact to the crime of robbery. The objection to such testimony was that it was immaterial; this objection was overruled by the trial court, and after an unrecorded conference the prosecution was allowed to proceed with the examination. The evidence disclosed that on April 5, 1959, subsequent in time, but closely related to, the offense involved in the instant action, the accused, in the company of his brother, parked near a store, in Fort Worth, Texas; thereafter the accused's brother went to a telephone booth, and as the store owner came to the store the accused's brother went up to him. A struggle resulted

and the accused and his brother were shot by the store owner. The accused assisted his brother in making his get away. The accused's brother was charged with attempted robbery and the accused with being an accessory (R. 213-220).

The evidence was admissible on two bases. (1) It was evidence properly admissible to impeach the witness since it demonstrated misconduct on the part of the accused even though not resulting in a conviction. Wigmore, Evidence, §§ 983, 986. (2) The evidence was admissible to show the scheme or design regularly employed by the accused in carrying out criminal activities. *State v. Lyman*, 10 U. 2d 58, 348 P. 2d 340.

The general rule of evidence relating to the first point is stated in McCormick, Evidence, p. 87:

"The English common law tradition of 'cross-examination to credit', permits the counsel to inquire into the associations and personal history of the witness, including any particular misconduct which would tend to discredit his character, though not the subject of conviction for crime."

Thus, in *People v. Sorge*, 301 N. Y. 198, 93 N. E. 2d 637 (1950), it was held in a prosecution for abortion to be within the sound discretion of the trial judge to allow, by way of cross-examination, inquiry into other abortions committed by the accused.

In *State v. Neal*, 222 N. C. 546, 23 S. E. 2d 911 (1943), it was said that inquiry into other misconduct not amounting to conviction, viz a viz, larceny, assault, vagrancy, was permissible where the accused was charged with murder.

The matter is usually committed to the sound discretion of the trial judge, McCormick, *supra*, p. 87. In the instant case the trial judge gave consideration to the objections of the accused, and then ruled to allow the evidence. The accused did not deny the matter, but in fact enlarged upon the questions put by the prosecution. Counsel for the accused on redirect took it upon himself to expand the scope of inquiry and to explain away any impropriety. Under these circumstances it cannot be said that the Court abused its discretion. The rule in Utah has been recognized in the past. *State v. Neal*, 123 Utah 93, 254 P. 2d 1053 (1953). The only apparent limitations are those normally placed upon claimed irrelevant or immaterial testimony. The testimony of the witness was relevant to his credibility. The misconduct shown or examined into was such as to cast doubt upon the testimonial worth of the accused. Wigmore, *supra*, Section 981. The incident was closely related in time to the instant charge, and finally the accused was given full latitude

to rebut. Under these circumstances the trial judge did not abuse his discretion and the testimony was proper for impeachment.

The evidence was also admissible to show *modus operandi*. The evidence of the subsequent misconduct fits into the criminal pattern characterized by the activities of the instant case. As such the evidence was admissible to show a scheme or design. *State v. Neal*, *supra*; *State v. Lyman*, *supra*.

The evidence disclosed a similar pattern of operation between the misconduct in Fort Worth and that with which the accused was charged in Salt Lake. The actions show joint activity with the accused's brother; it demonstrates the use of the automobile as a get-away device, and finally the subject of the robbery being a retail grocery was the same. These facts were offered not to show the tendency of the accused for crime in general, but with direct relationship to the crime charged and hence were properly before the jury. *State v. Neal*, *supra*.

As was said in *State v. Neal*, *supra*, at page 100 Utah Reports:

“It was not error to permit the District Attorney to cross-examine defendant as to other

offenses. Over defendant's objection the District Attorney asked him if he committed four robberies in California, giving the time and place of each. * * *

"Of course, if this questioning stood alone and was made in bad faith without the District Attorney having reason to believe his guilty of such offenses, such procedure would be highly improper and the case should be reversed. But the evidence does not show that such was the case. * * *"

Nor does the evidence in the instant case show any ill-will or bad faith on the part of the prosecutor. Evidence as elicited was clearly relevant, and tends to show the District Attorney acted justifiably. Under these circumstances the receipt of the evidence was not error.

Nor could the receipt of the evidence be said to be prejudicial. The accused's counsel adopted the matter on redirect and the accused was allowed to explain his version to the jury without contradiction. In addition, the jury was instructed that the accused's testimony was to be weighed in the same fashion as any other witness; under such circumstances the accused was not prejudiced.

CONCLUSION

The accused was given a full and fair hearing on

the charges against him. A jury after hearing and weighing the evidence against him and on his behalf adjudged him guilty. An analysis of the errors raised on appeal show them to be without merit; as such the Court should affirm the jury's decision.

Respectfully submitted,

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